In the Supreme Court

of the United States

OCTOBER TERM, 1975

No. 75-983

JOEL ANTHONY LILES and
RALPH ALEXANDER BREMNER,

Petitioners,

v.

STATE OF OREGON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

PETITIONERS' REPLY MEMORANDUM

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The Oregon Attorney General errs in stating Oregon law does not allow a motion in arrest of judgment to be used to test the constitutionality of the criminal statute upon which the prosecution was based.

It is well established in Oregon that the issue of whether a criminal indictment or a civil complaint states facts sufficient to constitute a crime or a civil cause of action may be raised for the first time upon the appeal. *State* v. *Hopkins*, 227 Or. 395, 362 P.2d 378 (1961); *Johnson* v. *School Dist. 12*, 210 Or. 585, 312 P.2d 591 (1957).

This is essentially historical because the writ of error made the same challenge to the common law judgment roll, which included the pleadings, as did the general demurrer or motion in arrest of judgment. *Tellkamp* v. *McIlvaine*, 184 Or. 474, 189 P.2d 246 (1948); 1 Chitty on Criminal Law (Riley Ed.) 612-613 (*752), while by the Statute of Westminster II, 13 Edw. 1, c. 31 (1285), other challenges to the proceedings had to be imported into the record by a bill of exceptions taken in the trial court.

The reason given now is usually that the other objections — taken by a special demurrer — are curable. *State* v. *Holland*, 202 Or. 656, 666-667, 277 P.2d 386, 391 (1954).

Does such challenge — that the indictment fails to state facts sufficient to constitute a crime — include a challenge to the constitutionality of the statute upon which the indictment is founded? The answer is yes, although some of the decided cases have failed to distinguish whether the question of constitutionality was raised as to the statute upon which the pleading was founded or as to some other statute incidentally raised in the action.

> "Litigation may be likened to a syllogism wherein the major premise is the law of the land which need not be stated because it is already known to the court." *Dryden* v. *Daly*, 89 Or. 218, 223, 173 P. 667, 668 (1918).

> "Hence it is that a demurrer to a criminal complaint will bring before the court for consid-

> eration whether or not the acts charged, although within a legislative enactment defining a crime, are yet insufficient for the reason that the legislation itself is void." *State* v. *Nichols*, 77 Or. 415, 417, 151 P. 473 (1915).

> "The objection to the introduction of further evidence on the grounds that the statute on which the prosecution was based is unconstitutional and that the indictment did not state facts sufficient to constitute a crime is in effect a demurrer upon the latter ground." *State* v. *Berry and Walker*, 204 Or. 69, 72, 267 P.2d 993, 994, 267 P.2d 995, 282 P.2d 344, 282 P.2d 347 (1955).

In fact, the most recent decision of the Oregon Supreme Court invalidating a criminal statute was one in which the challenge in the trial was merely an objection on trial that the indictments did not state crimes, *State* v. *Hodges*, 254 Or. 21, 457 P.2d 491 (1969), Appellant's Brief, p. 5, which objection may be raised for the first time on appeal. *State* v. *Hopkins*, 227 Or. 395, 362 P.2d 378 (1961).

In equating the test for obscenity in a statute with "the little boy with his mother by his side" test (Petition pp. 8-9, Opposition p. 11) the Circuit Court interpreted the Oregon statute to cover situations impermissible under the standards set by the Supreme Court of the United States and so made the Oregon statutes unconstitutional.

Respectfully submitted,

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